

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JASON McGEHEE, et al.,

Plaintiffs,

v.

NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES,

Defendant.

Case No. 4:18-CV-03092

NOTICE OF APPEAL

Notice is hereby given that Defendant Nebraska Department of Correctional Services (“NDCS”) appeals to the United States Court of Appeals for the Eighth Circuit the Memorandum and Order of March 15, 2019, (Filing 36), which denied NDCS’ assertion of Eleventh Amendment immunity as a defense to this suit.

The Supreme Court has held and the Eighth Circuit has recently reiterated that an order rejecting an Eleventh Amendment immunity defense raised by a State defendant is immediately appealable. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993); *McDaniel v. Precythe*, 897 F.3d 946, 949 (8th Cir. 2018). The *Puerto Rico* Court held that the right involved is the right *not to be sued* in federal court, that it involves a fundamental constitutional protection, and that it is for the most part lost if the case is allowed to proceed. *Puerto Rico*, 506 U.S. at 144-45. The immunity of the States from suit is not just immunity from liability, but from the suit itself. *Id.* at 145-46. The application of the collateral order (*Cohen*) doctrine, permitting immediate appeal, is justified both by the States’ right not to be unduly burdened by litigation, and by the importance of ensuring that the States’

dignitary interests be fully vindicated. *Id.* at 146. The appeal of the denial of a sovereign (or quasi-sovereign) immunity assertion is an appeal as a matter of right under 28 U.S.C. § 1291. *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1156 (10th Cir. 2014); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988).

Dated April 12, 2019.

Respectfully submitted,

**NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES,
Defendant.**

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

s/David A. Lopez